SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1089

RICHARD OSEREDZUK,

Petitioner,

v.

WARNER COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1973.

No.

RICHARD OSEREDZUK,

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v.

WARNER COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Richard Oseredzuk, prays that a Writ of Certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in the above case on October 25, 1973 (Appendix D).

OPINIONS BELOW.

The Memorandum and Order of the District Court for the Eastern District of Pennsylvania, printed in the Appendix E, is reported at 354 F. Supp. 453 (E. D. Pa. 1973). The Judgment Order of the United States Court of Appeals for the Third Circuit is printed as Appendix D hereto and is reported at 485 F. 2d 680 (3rd Cir. 1973).

JURISDICTION.

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on October 25, 1973 (Appendix D). The jurisdiction of this Court is involved under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

In an action for personal injuries wherein a tugboat crewman sustained serious injuries in the course of his employment on a large man-made lake, within the borders of one state, is there not Admiralty jurisdiction wherein the lake was navigable, for any one or combination of the following:

(a) its direct physical connection with the Delaware River, as evidenced by dredges entering the lake directly from the Delaware River;

(b) its direct use in interstate commerce;

(c) its capability of being made a permanent thoroughfare with an interstate waterway;

(d) its dependence on an interstate waterway for its water level and its separation from said interstate waterway by a system of dikes, pumps and dams;

(e) its use by an industry in interstate commerce;

(f) its use by vessels of the type traditionally used in interstate commerce.

STATUTES INVOLVED.

The statutory provisions involved are *United States Constitution,* Article III (Appendix A), 46 U. S. C. § 185 (Appendix C), and *Jones Act,* 46 U. S. C. A. § 688 et seq. (Appendix B).

STATEMENT OF THE CASE.

On December 10, 1969, plaintiff was engaged in his employment as deckhand on the tugboat "Vanguard" (Appendix 15a), a vessel owned and operated by defendant Warner Company (Appendix 14a-16a), and operating within Van Sciver Lake near Morrisville, Pennsylvania (Appendix 15a). Van Sciver Lake is man-made, is owned by defendants on three of its sides, and is connected to a second lake, Penn Manor, by a dike and permanent pump (Appendix 40a-44a). Penn Manor Lake in turn is connected to the Delaware River by a natural ground dam and pump (Appendix 46a-47a). Van Sciver Lake is approximately 1-1½ miles long, ½ mile wide, and approximately 10-25 feet deep (Appendix 40a). *A dredge was brought into Van Sciver Lake from a side inlet of the Delaware River* (Appendix 50a).[1] The dredge was brought into the lake by digging an inlet and floating in the dredge directly from the Delaware River (Appendix 51a). The water serving as the vehicle to float in the dredge also came from the Delaware River (Appendix 52a). As the dredge moved its way into the lake, the dredge backfilled so that the channel did not remain open to the Delaware (Appendix 53a).

On the date in question, the water was rough and the weather was windy and rainy (Appendix 16a). The tug's task was to bring an empty barge from the Warner plant located on the perimeter of the lake to one of the dredges situated in the lake waters (Appendix 16a). At approximately 5:30 p.m., the tug began to pull the barge alongside the dredge. Because of the rough condition of the water, the operator could not approach the dredge in the traditional manner as the usual approach site was too turbulent (Appendix 16a). Utilizing a new and different procedure,

1. In recent months a second dredge has been brought into the lake in the same manner.

the plainitff had to tie the end of the barge to enable the tug to bring the rearend of the barge closer to the dredge (Appendix 16a-17a). Plaintiff was unfamiliar with the procedure being used, and he was given no warning nor had he reason to know of the danger involved. He hooked the barge with a line and began wrapping it around the forward bit on the tug (Appendix 17a). The line was slack at that moment and the tug and barge were approximately three feet apart (Appendix 20a). Suddenly and without warning, the tug moved further away from the barge, approximately another three to five feet, the line lost its slack (Appendix 17a, 20a), and plaintiff's finger became caught in the line (Appendix 17a). The force was so great that the plaintiff's fingertip and first joint of the right index finger were amputated (Appendix 17a). He was removed from the tug and treated at St. Fancis Hospital in Trenton, New Jersey (Appendix 23a) and was absent from work for a considerable time.

It can be further noted that presently in operation in Van Sciver Lake are at least two dredges and nine barges (Appendix 58a). These vessels service the Warner plant, which engages in the manufacture and distribution of concrete.

Plaintiff seeks his remedy under the *Jones Act*, 46 U. S. C. A. §688 (Appendix B), and the general maritime law.

REASONS FOR GRANTING THE WRIT.

A Tugboat Crewman Engaged in His Employment Aboard a Tug, Navigating a Large Man-Made Lake, Is Entitled to Relief Under the Jones Act and General Maritime Law, as Said Body of Water Is Navigable for Any One or Combination of the Following:

A. Said Lake Has a Direct Physical Connection With the Delaware River, as evidenced by Dredges Entering the Lake Directly From the Delaware River.

The purview of admiralty jurisdiction, as it is granted in Article III of the Constitution, has not been static, but has rather been responsive to society's changing concepts of equity and utility.[2]

This expansion of jurisdiction is evidenced by the loosening construction of the terms "seaman" and "vessel" under the Jones Act to include many categories of employees not engaged in the vessel's navigation and water

2. The Admiralty Jurisdiction of the United States has been an ever-expanding concept.

In *Steam Boat Thomas Jefferson,* 6 L. Ed. 358 (1825), the Supreme Court held the admiralty jurisdiction extended no further than the ebb and flow of the tide. This doctrine was quickly put to rest in 1851 in *The Propeller Genessee Chief v. Fitzhugh,* 13 L. Ed. 1058 (1851).

The same reasoning has abrogated the archaic doctrine of access to the sea as a condition in determining navigability. In *Davis v. United States,* 185 F. 2d 938 (9th Cir. 1950), the Court held Lake Tahoe, a waterway having no access to the seas, to be navigable.

The Court, in *Davis,* stated:

"[8] It seems to us that the requirement of an outlet to the sea may be eliminated as unnecessary to federal jurisdiction under the commerce power for the same reasons. Congress is no more limited in the exercise of this power conferred by the Constitution by the fact that nature did not provide a large body of water with an outlet to the sea, than it is by the fact that the water is affected by the attraction of the moon and the sun. Federal power rests upon more practical considerations" (185 F. 2d at 942).

vehicles of every kind and description.[3] The result has been to produce a more extensive conception of the role that original maritime jurisdiction is to play in commercial affairs.

Maritime matters, upon which such a jurisdictional grant is based, ultimately are interpreted by a reference to the character of the water with which they are associated. It is in this respect that maritime law as applied in the United States has undergone its own expansion beyond the rigorous definitions of England. As two eminent authors have stated:

> ". . . Briefly, the admiralty jurisdiction of the United States extends to all waters, salt and fresh, with or without tides, natural or artificial, which are, in fact, navigable in interstate or foreign water commerce, *whether or not the particular body of water is wholly within a state,* and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state."[4] (Emphasis supplied.)

The traditional definition of navigable waters of the United States as is essential for federal jurisdiction, is contained in *The Daniel Ball,* 10 Wall. 557-563, 19 L. Ed. 999, 1001 (1870):

> ". . . And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign

3. Norris, the Law of Seamen; pages 25-33; 40-45.
4. *Gilmore and Black,* pages 28-29 (1957).

countries in the customary modes in which such commerce is conducted by water." (19 L. Ed. at 1001)[5]

In the instant case, at least two dredges were brought into the lake by a side inlet of the Delaware River, by digging an inlet and floating in the dredge. As the dredge moved in, they backfilled and closed the inlet.

Certainly at the time each dredge was in the process of making its way to the lake, there can be no doubt that there was a direct connection with the Delaware River and as such it is beyond peradventure that the lake was at least navigable at this time.

The law is crystal clear that a body of water that is once navigable remains navigable, as once admiralty jurisdiction attaches to a body of water it remains regardless of whatever physical facts may subsequently transpire.

Thus, in *Madole v. Johnson,* 241 F. Supp. 379 (W. D. La. 1965), a motorboat accident occurred on a lake formed by a dam built across a river which had been navigable in its natural state and on which there were two other dams with no locks or other conveyance available for transporting water craft around or through any of the dams. The Court held that the lake was navigable.

In *Loc-Wood Boat & Motors, Inc. v. Rockwell,* 245 F. 2d 306 (8th Cir., 1957) it was found that the Lake of the Ozarks, which was created by Bagnell Dam in the Osage River, entirely within the State of Missouri, was navigable

5. This definition is reiterated in *Economy Light & Power Company v. United States,* 65 L. Ed. 847, 848 (1921); *United States v. Steamer Montello,,* 20 Wall. 430, 439, 22 L. Ed. 391 (1874); *U. S. v. Appalachian Electric Power Company,* 311 U. S. 377, 406, 85 L. Ed. 243, 252 (1940); *In Re Madsen,* 187 F. Supp. 411, 413 (N. D. N. Y., 1960); *In Re Howser,* 227 F. Supp. 81, 86 (W. D. N. C. 1964); *Shogry v. Lewis,* 225 F. Supp. 741, 742 (W. D. Pa., 1964); *Pennsylvania Environmental Council v. Bartlett,* 315 F. Supp. 238, 252 (M. D. Pa., 1970); *1 Benedict on Admiralty,* 6th Ed., pp. 92-96.

waters within the admiralty and maritime jurisdiction of the United States.

In *Madole, supra,* and *Loc-Wood, supra,* as in the instant case, once navigability is attached it remains.

B. Said Lake Is Directly Involved in Interstate Commerce.

The test of navigability as set forth in *The Daniel Ball, supra,* specifically placed emphasis on the interstate commercial activities of the waterway. It is significant that the scope of the commercial activity on a given body of water be substantial or constant as long as a present commercial use can be demonstrated.[6]

In *Dow Chemical Company v. Dixie Carriers, Inc.,* 330 F. Supp. 1304 (S. D. Texas, 1971), a privately-owned barge canal was used to transport goods by barge to and from Dow Chemical plants. The movements were accomplished by Dow-owned tugs. The Court held the canel to be a navigable body of water, stating:

> "A privately-owned canal is within the term 'navigable waters of the United States', if it in fact supports interstate commerce . . .
>
> . . .
>
> . . . Although there is surprisingly little case authority on the precise point, this Court can reach only one considered conclusion—that the Dow barge canal by virtue of its link with interstate commerce and as a consequence of the character of its commercial use

6. *1 Benedict on Admiralty,* 6th Ed. § 44, p. 94, where it is stated:

> "Fitness for use by steam and sail vessels is not essential . . . navigation need not be continuous through the year, but must be as regular as the seasons and of a duration long enough to be useful and valuable in transportation."

> at all times material to this subject to the Rivers and Harbors Act . . ." (330 F. Supp. at 1307)

This conception of navigability coincides with the one expounded in *The Daniel Ball, et al., supra.*

In a most recent decision, *Adams v. The Montana Power Company,* 354 F. Supp. 1111 (D. Mont. 1973), it was held that a small boat capsizing on the Missouri River was not within the Maritime jurisdiction since the boat was not engaged in a traditional maritime activity. However, the Court appropriately stated,

> Obviously Justice Taney envisioned maritime commerce as something different from the travel of rowboats and canoes. It was the maritime activity on the inland waters which both required and accomplished the extension of maritime law to the inland waters. The term "navigable" was a useful word to describe the places where the commerce took place, *but it was the needs of the commerce rather than the description of the water which established admiralty jurisdiction.* (354 F. Supp. at 1112.) (Emphasis supplied.)

Certainly in the instant case, there can be no questioning the fact that Oseredzuk was engaged in interstate commerce, and it thus necessarily follows that maritime jurisdiction vests on Van Sciver Lake.

As evidence of Warner Company's engagement in interstate commerce it should be noted that they were utilizing the resources of the lake, for dredging and rinsing the product aggregate (Appendix 73a), and for transporting it through appropriate channels for interstate shipment, to be manufactured into concrete and lime. Such channels included Warner's own railroad (Appendix 74a), which carries the product a short distance to the barge connections

on the Delaware River (Appendix 75a). There is thus an intimate commercial connection between Van Sciver Lake and the Delaware River. The product is dredged and transported by barge along Van Sciver Lake, then carried by rail a very short distance, where the company then becomes dependent on the Delaware River for barge dispersal and generalized interstate distribution. The method of transportation on Van Sciver Lake, the use of barges, mobilized by tugs, is identical to that used on the Delaware, and, likewise, is the customary method utilized nationally. Such routine commercial practice must be interpreted as establishing "a continued highway over which commerce is or may be carried on . . . in the customary mode such commerce is conducted by water." *Daniel Ball, supra* at 1001.

The lake, at the present time, contains at least two dredges and nine barges (Appendix 56a), operated by Warner. In addition, however, the lake is utilized by the public by pleasure-boating purposes, and there are private docks along its perimeter (Appendix 41a, 69a). Warner is only in full ownership of three sides of the lake (Appendix 40a), and has leased to a Fishing and Boating Club the use of its land. Thus, the lake, while essentially privately owned, is, in fact, utilized by the public. Therefore, because of the Van Sciver's use of the highway for commerce, and its availability for public enjoyment, the lake must be characterized as public navigable waters in law.

C. Said Lake Is Navigable by Its Capability of Being Made a Permanent Thoroughfare With an Interstate Waterway.

The earlier standards of navigability have been enlarged somewhat by the utilization of a commerce clause rationale.[7]

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7. The reason for this expansion appears to be a recognition of the progressive engineering potential we possess to alter and improve

In *Doran v. Lee*, 287 F. Supp. 807 (W. D. Pa. 1968), the Court held that the power of Congress to legislate was not coextensive with the power of the admiralty court to adjudicate. However, the Court further stated:

> "The records of the Constitutional Convention reveal that admiralty law was considered preeminently a field of jurisdictions to be exercised by the courts of the United States because of the necessity of applying a uniform body of law in a field involving commercial relations between states and with foreign nations, a field where a substantial body of private international law existed and was applied by the principal commercial nations of the world." (287 F. Supp. at 809-10)

Notwithstanding the origin of Congress' authority under the Federal Power Act is based on unique economic considerations, the definition of navigability under the Act is based on the same relationship of the waterway to interstate commerce as defined in *The Daniel Ball, supra.*

In *Economy Light & Power Company v. United States, supra* at fn. 5, the Court cites *Montello, supra,* wherein it states:

> ". . . The capability of use by the public for the purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the

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7. (Cont'd.)

our waterways. This view is commonly invoked under the Federal Power Commission Act, but the same considerations should be equally applicable to tort claims occurring on such waters. This is because of the mutual dependence of Congress' authority and judicial admiralty jurisdiction on the standard of interstate commercial activity. Though it is a fundamental truth that the mere fact that water can be regulated by Congress under the commerce clause does not confer admiralty jurisdiction on the court, once Congress does, in fact, exercise such control by demonstrating a waterway's suitability for interstate commerce, the court's jurisdiction becomes vested.

> extent and manner of that use. If it be capable in its natural state of being used for the purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." (22 L. Ed. at 394)

The Court in *Economy Light* itself concluded:

> ". . . a river having actual navigable capacity in its natural state, and capable of carrying commerce among the states, is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions, or because of artificial obstructions." (65 L. Ed. at 855)

While the context of this case appears to be only within the commerce clause, Court decisions have adopted *Economy Light's* rationale to apply to tort cases obviously within admiralty jurisdiction. In *Madole v. Johnson, supra,* the Court adopted the commerce clause rationale stating:

> "The test of navigability set forth in *The Daniel Ball,* supra has been followed not only in admiralty and maritime cases but also in cases dealing with the authority of the Federal Power Commission to regulate the construction of dams which will obstruct navigable waters of the United States. (Citation omitted.) A third area in which this test of navigability has been applied is that dealing with the ownership of land forming the beds of navigable waters." (241 F. Supp. at 381)

The Court then cites the same passages quoted above from *Economy Power & Light Company v. United States, supra,* in support of its decision.

In the present action, it can be shown that in the absence of the artificial dike and dam which separate the three bodies of water, Van Sciver Lake, Penn Manor Lake and the Delaware River, would become one waterway, and must be included within the definition of navigability discussed *supra* in *Madole v. Johnson*. The dimensions of Van Sciver were estimated to be one to one and one-half miles long, one-half mile wide, and from ten to twenty-five feet deep (Appendix 40a). Penn Manor is separated from Van Sciver by a dike (Appendix 67a). Permanent pumps exist between the Delaware and Penn Manor, and Penn Manor and Van Sciver Lakes (Appendix 42a, 68a). Van Sciver Lake is on a higher level than Penn Manor by approximately four feet (Appendix 43a), but it was stated (Appendix 59a) that if no dam existed water would only flow out of Van Sciver to the extent that it reached a median water elevation and at mean low, the lake would be fourteen feet lower than at present. The conclusion must be that the lake, while decreasing in size, would remain intact and form a unified waterway to the Delaware River. Under such circumstances, the lake is navigable.[8]

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8. In support of this position, *Rochester Gas & Electric Corp. v. Federal Power Commission*, 344 F. 2d 594, 596 (2nd Cir. 1965), defines waters as "navigable" if (1) It presently is being used for, or is suitable for use for, or, (2) It has been used or was suitable for use in the past, or, (3) If it could be made suitable for use in the future by reasonable improvements.

In *U. S. v. Appalachian Electric Power Co.*, 85 L. Ed. 243, 252, 1940, it is stated "a waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial activity may be undertaken . . ." (at 253) "Nor is it necessary that the improvements should be actually completed or even authorized." (at 254). It is well recognized too that navigability may be of a substantial part only of the waterway in question. This position is concurred with in *Pa. Water & Power Co. v. FPC*, 123 A. 2d 155, 158 (Ct. Appeals D. C., 1941) and *U. S. v. Moretti, Inc.*, 331 F. Supp. 151, 157 (S. D. Fla., 1971).

It has been shown that removal of the dam separating the three bodies of water would form one waterway. It has also been demonstrated that the standards for navigability espoused under the Federal Power Act have applicability to tort cases arising under admiralty jurisdiction (*Madole v. Johnson, supra*). It must, therefore, be concluded that Van Sciver is navigable by its potential in becoming a direct thoroughfare to the Delaware River and thus admiralty jurisdiction is conferred.

D. Said Lake Is Navigable by Virtue of Its Dependence on Our Interstate Waterway for Its Water Level and Its Separation From Said Interstate Waterway by a System of Dikes, Pumps and Dams.

Van Sciver Lake is navigable by virtue of its direct connection to the Delaware River.

Between Van Sciver and the Delaware River there is at the present time a connection, in fact, and a dependence upon the Delaware River by defendant, Warner Company, to maintain the water level of Van Sciver Lake. It has been stated that (Appendix 42a) water is pumped into Van Sciver Lake from Penn Manor to maintain the level at a constant elevation. The reason for this is the difference in the heights of the two lakes, with Van Sciver being approximately four feet higher (Appendix 43a). Between Penn Manor and the Delaware River is an overflow dam (Appendix 46a). If there is excessive rain, water naturally flows from Penn Manor into the Delaware. If there is excessive drought, a permanently situated pump is brought into use to pump Delaware River water into Penn Manor Lake (Appendix 47a, 68a). On its eastern edge, Penn Manor is estimated to be less than 100 feet from the Delaware River (Appendix 48a).

The same situation presented itself in *Loc-Wood Boat & Motors, Inc., supra,* where it was found that the Lake of

the Osage, which was created by Bagnell Dam in the Osage River, was navigable waters, by virtue of its direct connection with an interstate waterway despite the fact that it was wholly within a single state.

The situation in the present action is analogous. Dams separate the successive bodies of water, yet there is a permanent provision for the transfer of water from one to the other, depending upon fluctuating water requirements. In *United Geophysical Company v. Vela,* 231 F. 2d 816 (5th Cir., 1956), it was found that a waterway was navigable where it sustained small commercial vessels, even though it originated as an artificial channel with subsequent man-made improvements. Likewise, Van Sciver Lake sustains commercial vessels and the extent of such activity is dependent upon the water level of the lake, which, in turn, is regulated by the Delaware River.

E. Said Lake Is Navigable by Virtue of Its Use by an Industry Engaged in Interstate Commerce.

Petitioner was a deckhand on the tug "Vanguard" at the time of the accident. On that particular day, the tug was in the process of removing an empty barge from the Warner Company plant and carrying it out to the Dredge in order to receive the aggregate product. The Plaintiff-Appellant testified (Appendix 16a) that on this occasion, the water was heavy and rough. Petitioner's immediate task was to aid in the attachment of tow lines to the barge, and offer general assistance in accomplishing the tug's purposes. Similar duties are characteristically performed on navigable waters in the furtherance of commerce.

The essential ingredient is simply interstate commerce. Where no such commerce exists, the body of water does not qualify for admiralty jurisdiction.[9]

9. There can be no doubt, however, that in the instant case such a connection with interstate commerce did exist.

To be distinguished from the plaintiff's situation are those cases which involve pleasure-boating accidents on completely landlocked lakes. *In the matter of Builders Supply Company,* 278 F. Supp. 254 (N. D. Iowa, 1968), plaintiff was injured on an 18 foot runabout on a small lake without any coalescing water courses, and without any relation to any other waterway, so as to service a highway for commerce. In *George v. Beavark, Inc.,* 402 F. 2d 977 (8th Cir., 1968), the only commercial activity pleaded by plaintiffs as occurring on the disputed waters was float-fishing. Further, the question presented to that court was plaintiff's limitation of liability under 46 USC, § 185 and the court's failure to find navigability preserved a substantial recovery for the injured party. Likewise, *In Re Madsen, supra,* at fn. 5 concerns a proceeding for limitation of liability arising from a pleasure-boating accident, and, again, in this instance, the court declined to find admiralty jurisdiction, thus preserving a substantial recovery for the plaintiff. *In Re Howser, supra,* at fn. 5, another proceeding for limitation of liability in a pleasure-boating accident, again the court found that the lakes formed within dams were not navigable, preserving a greater remedy for the injured party. In *Marine Office of America v. Manion,* 241 F. Supp. 621 (D. Mass., 1965) a pleasure boat collided with a dock. Libellant offered no evidence to prove the lake's connection with other waters, nor its use by commercial craft and thus jurisdiction was denied. In *Shogry v. Lewis, supra,* at fn. 5, the only commercial activity demonstrated on the lake was tourism, sight-seeing craft and the like.

In contradistinction, to the above authorities, the present plaintiff was not only injured upon waters intimately associated with others in interstate commerce, but he was himself one of the prime participants in the commercial venture.

Oseredzuk was performing a service which must be characterized as a "traditional maritime task", and hence to deny him admiralty jurisdiction of his claim would, in fact, be inviting the harsh and incongruous results.

F. Said Lake Is Navigable by Virtue of the Type of Vessels Operating on Said Lake.

In his text entitled "Law of Tug Tow and Pilotage", Alex Parks states in his introductory chapter, p. 4, "Tug boats are 'vessels' and so are barges. They ply their trade on navigable waters. Therefore, the legal principles which apply to them are those of admiralty." This unqualified statement undoubtedly arises out of the conception of the tugboat as the traditional participant in commercial activities on the seas.

It is further evidence of Van Sciver's navigability that this craft plies its waters, and of even more paramount significance here, since this was the very vessel aboard which the injury was sustained. As is stated *In Re River Queen*, 275 F. Supp. 403 (W. D. Ark. 1967),

> "In determining the capacity as bearing on the question of whether a stream should be considered as navigable, the inquiry should be made into the number of persons the stream would accommodate and the nature and extent of the kinds of vessels it would carry; . . . The stream must be navigable for some purpose useful to trade and commerce." (275 F. Supp. at 407)

In addition to the number of tugs Warner employs, it has been previously mentioned that two dredges and nine barges exist on the lake. Dredges have been held to be "vessels" within the meaning of the Jones Act.[10] *Los*

10. It is a common truth that the Jones Act should be liberally construed to accomplish its beneficent purposes. *Cosmopolitan Shipping v. McAllister*, 337 U. S. 73 (1948); *Cortes v. Balt. Insular*

Angeles v. United Dredging Co., 14 F. 2d 364 (9th Cir., 1926), and so have barges, *Mach v. Pennsylvania Railroad Co.*, 317 F. 2d 761 (3d Cir., 1963). Van Sciver, possessing substantial numbers of varieties of commercial vessels, must be considered as navigable.

CONCLUSION.

This Court is requested to review this matter and to interpret Article III of the Constitution of the United States to determine whether a seaman injured on a large, man-made waterway within the boundaries of one state can recover for injuries under the Jones Act and general maritime law, wherein the waterway has

(a) a direct physical connection with the Delaware River, as evidenced by dredges entering the lake directly from the Delaware River;

(b) a direct use in interstate commerce;

(c) a capability of being made a permanent thoroughfare with an interstate waterway;

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10. (Cont'd.)
Line, 287 U. S. 387 (1932); *Jamison v. Encarnacion*, 281 U. S. 635 (1929); *Castro v. Moore-McCormack Lines, Inc.*, 325 F. 2d 72 (2d Cir., 1963).

In *Offshore Company v. Robison*, 266 F. 2d 769 (5th Cir., 1959), it is stated:

> "In discussing the effect of the Longshoremen's and Harbor Workers' Act, the First Circuit stated: 'The process of liberal construction of the Jones Act cannot now be ignored because Congress has seen fit to pass the Longshoremen's Act. As a result of the cases, we feel constrained to hold that one who does any sort of work aboard a ship in navigation is a "seaman" within the meaning of the Jones Act'." (266 F. 2d at 774)

Thus, it is demonstrated that every criterion included within the Act has traditionally been given a very liberal interpretation.

(d) dependence on an interstate waterway for its water level and its separation from said interstate waterway by a system of dikes, pumps and dams;

(e) a use by an industry in interstate commerce;

(f) a use by vessels of the type traditionally used in interstate commerce.

It is respectfully submitted that the issues herein are of the greatest significance in the law of admiralty, and must be considered and resolved by this Court in order to prevent a perpetuation of the decisions below.

Respectfully submitted,

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APPENDIX A.

THE JUDICIARY.

Article III.—The Judiciary.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX B.

The Jones Act (46 USCA).

§ 688. *Recovery for injury to or death of seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

APPENDIX C.

§ 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee.

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R. S. § 4285; June 5, 1936, c. 521, § 3, 49 Stat. 1480.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1654.

RICHARD OSEREDZUK,

Appellant,

v.

WARNER COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 25, 1973.

Before McLAUGHLIN, GIBBONS, ROSENN, *Circuit Judges.*

Judgment Order.

This is an appeal from the grant of summary judgment in favor of the defendant in a personal injury action alleged to be within the admiralty jurisdiction of the United States District Court and within the coverage of the Jones Act, 46 U. S. C. § 688 et seq. The district court held that on the undisputed facts the place where the injury occurred, Van Sciver Lake, was not navigable within admiralty law. We agree.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs to appellee.

By the Court,

JOHN J. GIBBONS,
Circuit Judge.

Attest:

THOMAS F. QUINN,
Thomas F. Quinn,
Clerk.

Dated: October 25, 1973

APPENDIX E.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 70-672.

RICHARD OSEREDZUK

v.

WARNER COMPANY.

Memorandum and Order.

GREEN, *J.* June 13, 1972

In this Jones Act[1] cause of action brought in this court under admiralty jurisdiction, defendant has moved to dismiss for lack of jurisdiction over the subject matter. Specifically, defendant argues that the body of water where the accident occurred is not "navigable" within the meaning of admiralty law. Upon consideration of oral argument, depositions and memoranda, we shall grant defendant's motion for the reasons set forth below.

The undisputed facts reveal that the plaintiff was injured while working on a tug which, along with several dredges and barges, plied Van Sciver Lake pursuant to dredging operations carried on by the defendant. Van Sciver Lake is a man-made, land-locked lake located on property owned by defendant, completely within the Commonwealth of Pennsylvania. The lake is one and one-half

1. 46 U. S. C. § 688 (1958).

miles long and one-half mile wide and is situated adjacent to Penn Manor Lake, which is smaller than Van Sciver Lake, and is itself adjacent to the Delaware River but is without navigational access to the River. Penn Manor Lake is also completely land-locked and does not flow into Van Sciver Lake. No boats, ships or vessels may enter or leave these two lakes by way of water.[2]

First, although not expressly noted in the statute, it is beyond doubt that a Jones Act cause of action does require, *inter alia*, the presence of a "navigable" body of water in order to confer federal jurisdiction. *E.g., McKie v. Diamond Marine Co.*, 204 F. 2d 132 (5th Cir. 1963); *Gahagan Const. Corp. v. Armao*, 165 F. 2d 301 (1st Cir. 1948); 2 M. Norris, *The Law of Seamen*, § 688, at 301 (3rd ed. 1970); *see generally Swanson v. Mara Bros.*, 328 U. S. 1, 66 S. Ct. 869 (1946); G. Gilmore and C. Black, *The Law of Admiralty*, § 6-21, at 283 (1957). Second, it is equally clear that in order to support admiralty jurisdiction this "navigable" body of water must constitute part of a continuous water system capable of sustaining interstate or foreign commerce. This requirement of navigability for admiralty jurisdiction was definitively set forth in *The Daniel Ball*, 77 U. S. 557 (1871), at 563:

> "And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which commerce is conducted by water."

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2. See, however, n.4, *infra*.

Under this standard, land-locked lakes located wholly within one state have consistently been found to be non-navigable within the meaning of admiralty law. *Doran v. Lee,* 287 F. Supp. 807 (W. D. Pa. 1968); *In Re Builders Supply Co.,* 278 F. Supp. 254 (D. C. Iowa 1968); *Marine Office of America v. Manion,* 241 F. Supp. 621 (D. Mass. 1965); *Shogry v. Lewis,* 225 F. Supp. 741 (W. D. Pa. 1964); *Howser's Petition,* 227 F. Supp. 81 (D. C. N. C. 1964); *Madsen's Petition,* 187 F. Supp. 411 (N. D. N. Y. 1960); *But see Loc-Wood Boat and Motors v. Rockwell,* 145 F. Supp. 848 (W. D. Mo. 1956), *aff'd,* 245 F. 2d 306 (8th Cir. 1957). In each of the first five cases above, the court found a lack of admiralty jurisdiction because the land-locked lake was not connected with any other navigable water so as to constitute part of a navigation system over which interstate and foreign commerce could flow. Such cases, in our opinion, are persuasive authority for the granting of defendant's motion. This is especially so when the concept of federal admiralty jurisdiction is viewed in light of its derivation: *i.e.,* "the necessity of applying a *uniform* body of law in a field involving commercial relations between states and with foreign relations." *Doran v. Lee, supra,* at 809 (emphasis supplied). The above cases, like the case before us, involved considerations of an exclusively local nature, devoid of substantial federal interest.

Plaintiff cites *State of Utah v. United States,* 403 U. S. 9, 91 S. Ct. 1775 (1971) for the proposition that a land-locked lake located completely within a state may be "navigable" for admiralty jurisdiction purposes. That case is plainly inapposite since the issue there was the ownership of the lake bed formerly covered by the Great Salt Lake and not whether the lake qualified as a navigable body of water in the admiralty jurisdiction context. Indeed, the Supreme Court expressly recognized the distinc-

tion between "navigability" for purposes of determining property rights and "navigability" for purposes of admiralty law and the Commerce Clause. The Court said:

> "Moreover, the fact that the Great Salt Lake is not part of a navigable interstate or international commercial highway in no way interferes with the principle of public ownership of its bed. *United States v. Utah,* 283 U. S. 64, 75, 51 S. Ct. 438, 440, 75 L. Ed. 844; *United States v. Oregon,* 295 U. S. 1, 14, 55 S. Ct. 610, 615, 79 L. Ed. 1267" 91 S. Ct. at 1776.

Similarly without merit is plaintiff's second argument against dismissal wherein he proposed that Van Sciver Lake is "navigable" within the meaning of admiralty law because it *could be* connected to an interstate commerce system by removing part of the narrow strip of land separating it from Penn Manor Lake and removing part of the land between Penn Manor Lake and the Delaware River. For this rationale of navigability based on possible future improvements, plaintiff cites *United States v. Appalachian Electric Power Co.,* 311 U. S. 377, 61 S. Ct. 291 (1940). *See also Economy Light and Power Co. v. United States,* 256 U. S. 113, 41 S. Ct. 409 (1921). We need not consider the factual basis for plaintiff's contention [3] since we are of the opinion that admiralty jurisdiction must be determined at the time of the loss and that the concept of future interstate navigability propounded in *Appalachian Electric Power Co., supra,* relates only to the exercise of Congressional regulatory power under the Commerce Clause and not to the scope of the federal courts' powers

3. Plaintiff's counsel asserted at oral argument and in his reply memorandum, with reference to a deposition, that a barge in fact was brought from the Delaware River into Penn Manor Lake by dredging a hole in the land partition separating the two bodies of water and floating the barge through the gap.

pursuant to the grant of admiralty jurisdiction. As the Court stated in *Doran v. Lee, supra,* at 811:

> "[T]he Commerce Clause of the Constitution . . . is a different constitutional power; it defines the powers of Congress to legislate but it cannot be used to enlarge the specific jurisdiction of the United States courts in admiralty. The powers of Congress to legislate are greater than the powers of the Federal courts to adjudicate."

See generally Guinn, "An Analysis of Navigable Waters of the United States," XVII Baylor Law Review, No. 4, Fall 1966.

Accordingly, we enter the following order.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 70-672.

RICHARD OSEREDZUK

v.

WARNER COMPANY

Order.

AND NOW, this 13th day of JUNE, 1972, it is hereby ORDERED that defendant's motion to dismiss plaintiff's cause of action is hereby GRANTED.

BY THE COURT:

CLIFFORD SCOTT GREEN,
Clifford Scott Green, *J.*

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1089

RICHARD OSEREDZUK,

Appellant,

v.

WARNER COMPANY,

Appellee.

MOTION OF APPELLEE TO AFFIRM THE JUDGMENT OF THE COURT BELOW ON THE GROUND THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .

RICHARD OSEREDZUK,

Appellant,

v.

WARNER COMPANY,

Appellee.

MOTION OF APPELLEE TO AFFIRM THE JUDGMENT OF THE COURT BELOW ON THE GROUND THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

STATEMENT OF THE QUESTION PRESENTED.

Did not the Court below properly decide that it had no jurisdiction over the cause where the plaintiff was injured during the course of his employment aboard a vessel owned by appellee on a land locked, man made lake over ground owned by appellee that was solely within the boundaries of the Commonwealth of Pennsylvania.

STATEMENT OF THE CASE.

The action of Appellant was instituted in the United States District Court for the Eastern District of Pennsylvania to recover damages for injuries sustained during the course of his employment by appellee on December 10, 1969. At that time, Appellant was working aboard a vessel owned by appellee that was operated on Van Sciver Lake (Appendix 15a-16a). Van Sciver Lake is a man made land locked lake existing upon property owned by appellee and was created by the process of dredging sand and gravel that began sometime in the 1920's (Appendix 37a, 38b and 67a).

Sand and gravel are dredged from the lake bed and used in the operations of appellee. As the product being dredged in an area becomes exhausted, the dredge moves to another area of the lake. As a result, the size and shape of the lake changes (Appendix 73a-74a). Van Sciver Lake is some distance from the Delaware River. Adjacent to it, and between it and the Delaware River, is Penn Manor Lake, another man-made land locked lake. No dredging operations are performed in Penn Manor Lake and it is separated from Van Sciver Lake by a dike (Appendix 67a).

Neither of the lakes has any navigational access to the Delaware River. There has never been a navigable channel, stream, lock or other device to permit a vessel to navigate from Van Sciver Lake. There are no plans to put in locks or other devices that would allow ingress or egress by a vessel from Van Sciver Lake (Appendix 62a).

At the time that the incident giving rise to this accident occurred there were two dredges working on Van Sciver Lake. The first one had been built on the lake (Appendix 50a). The second, being the dredge VIKING, began working on Van Sciver Lake in October 1970 (Appendix 69a). It had been brought up the Delaware River to the

Franklin Basin which is a tidal basin off that River. That basin was separated from Van Sciver Lake by land that measured approximately one thousand feet in width (Appendix 71a).

The dredge was moved from Franklin Basin to Van Sciver Lake in the following manner. A bulldozer was used to lower the level of the land. Then the dredge proceeded to dredge out an area which filled with water of sufficient depth to float it. The dredge then began to dredge out a path to its front while the bulldozer was used to refill the area it had lowered thus sealing off any flow from the Franklin Basin. The dredge then dug out its own path dredging in front and filling in behind as it went with the result that when it reached Van Sciver Lake the path behind it had been backfilled. At no time was there an opening running between Franklin Basin and Van Sciver Lake (Appendix 76a).

As owner of the area surrounding and under Van Sciver and Penn Manor Lakes, Warner Company entered into a lease of those premises with the Penn Manor Realty Co., Inc. which operates the Penn Manor Hunting and Fishing Club (Appendix 45a and 65a). As a result of these arrangements, private pleasure boats also use the lakes. These boats are brought to the water over land and not through the Delaware River (Appendix 69a).

ARGUMENT.

There is no Admiralty or Maritime Jurisdiction in the Federal Court for Injuries Sustained by an Individual Working on a Land Locked Man-Made Lake Located Solely Within the Boundaries of One State.

In the brief of appellant he argues several bases for admiralty and maritime jurisdiction. He urges that the nature of the services that plaintiff performed established the navigability of Van Sciver Lake. He argues that the type of vessel involved establishes navigability. Appellee will concede that if this claimed accident occurred upon a navigable waterway of the United States that appellant would be entitled to pursue his remedies under the Jones Act, 46 U. S. C. A. § 688.

The appellant has elected to pursue recovery based upon the Jones Act (4a). As was found by the learned Trial Judge, "a Jones Act cause of action does require, inter alia, the presence of a 'navigable' body of water in order to confer federal jurisdiction". *McKie v. Diamond Marine Co.*, 204 F. 2d 132 (5th Cir. 1963); *Gahagan Const. Corp. v. Armao*, 165 F. 2d 301 (1st Cir. 1948) (81a). Accordingly, the nature of appellee's operations, the nature of appellant's duties and/or the type of vessel involved are irrelevant to the issue involved in this appeal. The sole question for determination is whether Van Sciver Lake was navigable at the time of the incident involved herein within the meaning of the Admiralty and Maritime jurisdiction of the United States.

In appellant's brief he has cited *Gilmore and Black* where he quotes from their treatise as follows:

> . . . Briefly, the admiralty jurisdiction of the United States extends to all waters, salt and fresh, with or without tides, natural or artificial, which are, in fact,

> navigable in interstate or foreign water commerce, whether or not the particular body of water is wholely within a state, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state.

However, what has been quoted by the appellant is only part of the expression of opinion being recited by the authors. This above quoted passage continues:

> Thus, the Erie Canal is within the jurisdiction, though wholely within the State of New York, for it is navigated in interstate water commerce. The status of the Great Lakes and the Mississippi and its tributaries is clear; they are within the jurisdiction. What decisions there are point to the commonsense conclusion that small bodies of water, wholely in one state and not navigable in interstate or foreign commerce, are not included (Emphasis supplied) (Gilmore and Black pp. 28-29, 1957).

Accordingly, applying the test above recited there is no question but that Van Sciver Lake is not included within the admiralty jurisdiction of the United States.

The question of Admiralty jurisdiction must be determined by the character of the waterway at the time of the loss giving rise to the litigation. *Doran v. Lee,* 287 F. Supp. 807 (W. D. Pa. 1968); *Shogry v. Lewis,* 225 F. Supp. 741 (W. D. Pa. 1964). As the court stated in *Doran, supra* in referring to Maritime law:

> Such law must be applied in all waters forming part of the stream of interstate or foreign commerce, but the limitations of the exercise of jurisdiction by the United States' Courts prohibits its application to what are essentially common law actions of an exclusively local nature.

> Inland lakes having no existing connection to other watercourses by which a stream of commerce is or may be carried had been declared not to be within the admiralty jurisdiction (Citing cases) (At 810).

Appellant at page seven of his brief attempts to establish a direct connection between Van Sciver Lake and the Delaware River by means of an inlet between the two bodies of water. An inlet has been defined as a narrow opening by which a body of water penetrates into the land. *deKerchove, International Maritime Dictionary* (2nd Ed. 1961). Although there was testimony to the effect that an inlet was used, the description of the method conclusively shows that one was not created. The dredge dug out an area to its forward end of sufficient depth to float it. It then continued dredging forward and filling in the area at its aft end that it had just traversed. The result was that at any given moment the dredge was operating only in water sufficient for it to remain afloat, completely surrounded on all sides by land while it traversed the one thousand feet of land that separated Van Sciver Lake from the Franklin Basin of the Delaware River (Appendix 71a-76a).

The case of *Madole v. Johnson*, 241 F. Supp. 379 (W. D. La., 1965) and *Loc-Wood Boat and Motors, Inc. v. Rockwell*, 245 F. 2d 306 (8th Cir., 1957) cited by appellant in his brief fail to support his position with respect to the claim that the Van Sciver Lake is a navigable water of the United States. Each of those cases dealt with personal injuries that were sustained on a lake that had been formed by the building of a dam across a river which previously had been a navigable river of the United States and as such was clearly within the Admiralty and Maritime jurisdiction of the United States. However, such is not the case here

where Van Sciver Lake has never been a navigable water of the United States.

The appellant also quotes the classic definition of navigable waterways as recited in *The Daniel Ball,* 19 L. Ed. at 1001. This definition requires that for waters to be navigable they must, in their ordinary condition by themselves, or by uniting with other waters, form a continued highway over which commerce is or may be carried in interstate or foreign commerce in the customary modes in which such commerce is conducted by water. Appellant urges that this definition indicates that the basic test is the commercial nature of the business. Rather, this test clearly requires that the waterways, in their natural state, be able to carry commerce *"in the customary modes in which such commerce is conducted by water"* (*The Daniel Ball* at 1001) (Emphasis supplied).

It is uncontradicted in the record of this case that Van Sciver Lake is land-locked. It is established that Van Sciver Lake is man-made and has always been land-locked. Accordingly, there is no possible manner by which Van Sciver Lake could be considered a continued highway for commerce conducted by water.

Appellant places reliance upon the case of *Dow Chemical Company v. Dixie Carriers, Inc.,* 330 F. Supp. 1304 (S. D. Texas 1971). That case has no relevance to the facts involved herein. In that case, a canal was private but was connected with intercoastal waterways. It clearly had a direct connection by water with intercoastal commerce and was capable, in fact, of supporting and did indeed support the customary modes of commerce conducted by water as is required. Van Sciver Lake, being land-locked, is clearly distinguishable from the canal in the *Dow Chemical* case.

Appellant contends that the court must also consider the feasibility of making Van Sciver Lake navigable to determine Admiralty jurisdiction. This position concedes

the fact that in its present state Van Sciver Lake is not a navigable water of the United States. The cases upon which appellant relies for this proposition are cases interpreting the expanse of the interstate commerce clause.

The Court stated in *Doran v. Lee, supra:*

> Commerce clause of the Constitution defines the powers of the Congress to legislate but it cannot be used to enlarge the specific jurisdiction of the United States in Admiralty. The powers of Congress to legislate are greater than the powers of the Federal Courts to adjudicate.

Appellant admits that the exercise by Congress of its power to regulate interstate commerce under the Federal Power Act is based on unique economic considerations. An analysis of the major cases dealing with an interpretation of navigability indicates that there have been three principal sources of litigation, namely Admiralty matters, questions involving proprietary rights in rivers and those cases involving the Interstate Commerce interest of the Federal Government with respect to dams and bridges on and over waterways.

In the property and commerce cases, the test outlined in *The Daniel Ball* and *U. S. v. Appalachian Power Co.*, 311 U. S. 377, 85 L. Ed. 243 (1940) are liberally construed with respect to a determination of whether or not a stream is a navigable water of the United States. However, the admiralty courts usually rely on admiralty holdings and do not apply the proprietary or commerce test to strictly admiralty matters.

As was stated by the United States Court of Appeals for the 5th Circuit in the case of *The Lucky Lindy*, 76 F. 2d 561 (1935) quoting from an opinion of Mr. Justice Clifford, in *The Belfast*, 7 Wall. 624, 640, 19 L. Ed. 266:

> "Difficulties attend every attempt to define the exact limitations of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants."

The opinion of the Court in *The Lucky Lindy, supra* can be interpreted to stand for the proposition that the power of Congress to regulate interstate commerce requires a lesser degree of navigation than that required in the admiralty cases and that that court was of the opinion that the commerce cases had no relevance in an admiralty issue.[1]

CONCLUSION.

In summary, it is apparent that the body of water upon which this incident occurred is not nor ever has been navigable within the meaning of the admiralty and maritime jurisdiction of the United States. This incident occurred exclusively within the confines of the Commonwealth of Pennsylvania. Accordingly, it is for that state through its legislation and common law to determine the rights and remedies of the appellant and it is for the courts of that state to adjudicate these rights and remedies. The Order of the Trial Judge dismissing Appellant's action should be affirmed.

Respectfully submitted,

THOMAS J. INGERSOLL,
DEASEY, SCANLAN & BENDER, LTD.,
Attorneys for Appellee.

1. See generally, Quinn, "An Analysis of Navigable Waters of the United States", XVII Baylor Law Review, No. 4, Fall 1966.

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1089.

RICHARD OSEREDZUK,

Petitioner,

v.

WARNER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR EMPLOYER RESPONDENT IN OPPOSITION.

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BRIEF FOR EMPLOYER RESPONDENT IN OPPOSITION.

STATEMENT OF THE QUESTION PRESENTED.

Did not the Court below properly decide that it had no jurisdiction over the cause where the plaintiff was injured during the course of his employment aboard a vessel owned by Respondent on a land-locked, man-made lake over ground owned by Respondent that was solely within the boundaries of the Commonwealth of Pennsylvania?

STATEMENT OF THE CASE.

The action of Petitioner was instituted in the United States District Court for the Eastern District of Pennsylvania to recover damages for injuries sustained during the course of his employment by Respondent on December 10, 1969. At that time, Oseredzuk was working aboard a vessel owned by Warner Co. (Warner) that was operated on Van Sciver Lake (Appendix 15a-16a). Van Sciver Lake is a man-made land-locked lake existing upon property owned by Warner and was created by the process of dredging sand and gravel that began sometime in the 1920's (Appendix 37a, 38a and 67a).

Sand and gravel are dredged from the lake bed and used in the operations of Warner. As the product being dredged in an area becomes exhausted, the dredge moves to another area of the lake. As a result, the size and shape of the lake changes (Appendix 73a-74a). Van Sciver Lake is some distance from the Delaware River. Adjacent to it, and between it and the Delaware River, is Penn Manor Lake, another man-made land-locked lake. No dredging operations are performed in Penn Manor Lake and it is separated from Van Sciver Lake by a dike (Appendix 67a).

Neither of the lakes has any navigational access to the Delaware River. There has never been a navigable channel, stream, lock or other device to permit a vessel to navigate from Van Sciver Lake. There are no plans to put in locks or other devices that would allow ingress or egress by a vessel from Van Sciver Lake (Appendix 62a).

At the time that the incident giving rise to this accident occurred there were two dredges working on Van Sciver Lake. The first one had been built on the lake (Appendix 50a). The second, being the dredge VIKING, began working on Van Sciver Lake in October 1970 (Appendix 69a). It had been brought up the Delaware River to the

Franklin Basin which is a tidal basin off that River. That basin was separated from Van Sciver Lake by land that measured approximately one thousand feet in width (Appendix 71a).

The dredge was moved from Franklin Basin to Van Sciver Lake in the following manner. A bulldozer was used to lower the level of the land. Then the dredge proceeded to dredge out an area which filled with water of sufficient depth to float it. The dredge then began to dredge out a path to its front while the bulldozer was used to refill the area it had lowered thus sealing off any flow from the Franklin Basin. The dredge then dug out its own path dredging in front and filling in behind as it went with the result that when it reached Van Sciver Lake the path behind it had been backfilled. At no time was there an opening running between Franklin Basin and Van Sciver Lake (Appendix 76a).

As owner of the area surrounding and under Van Sciver and Penn Manor Lakes, Warner Company entered into a lease of those premises with the Penn Manor Realty Co., Inc. which operates the Penn Manor Hunting and Fishing Club (Appendix 45a and 65a). As a result of these arrangements, private pleasure boats also use the lakes. These boats are brought to the water over land and not through the Delaware River (Appendix 69a).

REASON FOR DENYING THE WRIT.

There Is No Admiralty or Maritime Jurisdiction in the Federal Court for Injuries Sustained by an Individual Working on a Land-Locked Man-Made Lake Located Solely Within the Boundaries of One State.

In the brief of Oseredzuk he argues several bases for admiralty and maritime jurisdiction. He urges that the nature of the services that he performed established the navigability of Van Sciver Lake. He argues that the type of vessel involved establishes navigability. Warner will concede that if this claimed accident occurred upon a navigable waterway of the United States that Oseredzuk would be entitled to pursue his remedies under the Jones Act, 46 U. S. C. A. § 688.

Oseredzuk has elected to pursue recovery based upon the Jones Act (4a). As was found by the learned Trial Judge, "a Jones Act cause of action does require, inter alia, the presence of a 'navigable' body of water in order to confer federal jurisdiction". *McKie v. Diamond Marine Co.*, 204 F. 2d 132 (5th Cir. 1963); *Gahagan Const. Corp. v. Armao*, 165 F. 2d 301 (1st Cir. 1948) (81a). Accordingly, the nature of Respondent's operations, the nature of Petitioner's duties and/or the type of vessel involved are irrelevant to the issue involved in this appeal. The sole question for determination is whether Van Sciver Lake was navigable at the time of the incident involved herein within the meaning of the Admiralty and Maritime jurisdiction of the United States.

In Oseredzuk's brief he has cited *Gilmore and Black* where he quotes from their treatise as follows:

> ". . . Briefly, the admiralty jurisdiction of the United States extends to all waters, salt and fresh, with or without tides, natural or artificial, which are, in fact,

navigable in interstate or foreign water commerce, whether or not the particular body of water is wholely within a state, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state." pp. 28-29 (1957).

However, what has been quoted by Oseredzuk is only part of the expression of opinion being recited by the authors. This above quoted passage continues:

"Thus, the Erie Canal is within the jurisdiction, though wholely within the State of New York, for it is navigated in interstate water commerce. The status of the Great Lakes and the Mississippi and its tributaries is clear; they are within the jurisdiction. *What decisions there are point to the commonsense conclusion that small bodies of water, wholely in one state and not navigable in interstate or foreign commerce, are not included.*" (Emphasis supplied) (Gilmore and Black pp. 28-29, 1957).

Accordingly, applying the test above recited there is no question but that Van Sciver Lake is not included within the admiralty jurisdiction of the United States.

The question of Admiralty jurisdiction must be determined by the character of the waterway at the time of the loss giving rise to the litigation. *Doran v. Lee,* 287 F. Supp. 807 (W. D. Pa. 1968); *Shogry v. Lewis,* 225 F. Supp. 741 (W. D. Pa. 1964). As the court stated in *Doran, supra,* in referring to Maritime law:

"Such law must be applied in all waters forming part of the stream of interstate or foreign commerce, but the limitations of the exercise of jurisdiction by the United States' Courts prohibits its application to what are essentially common law actions of an exclusively local nature.

Inland lakes having no existing connection to other watercourses by which a stream of commerce is or may be carried had been declared not to be within the admiralty jurisdiction." (Citing cases) (At 810).

Oseredzuk at page seven of his brief attempts to establish a direct connection between Van Sciver Lake and the Delaware River by means of an inlet between the two bodies of water. An inlet has been defined as a narrow opening by which a body of water penetrates into the land. *de Kerchove, International Maritime Dictionary* (2nd Ed. 1961). Although there was testimony to the effect that an inlet was used, the description of the method conclusively shows that one was not created. The dredge dug out an area to its forward end of sufficient depth to float it. It then continued dredging forward and filling in the area at its aft end that it had just traversed. The result was that at any given moment the dredge was operating only in water sufficient for it to remain afloat, completely surrounded on all sides by land while it traversed the one thousand feet of land that separated Van Sciver Lake from the Franklin Basin of the Delaware River (Appendix 71a-76a).

The cases of *Madole v. Johnson,* 241 F. Supp. 379 (W. D. La., 1965) and *Loc-Wood Boat and Motors, Inc. v. Rockwell,* 245 F. 2d 306 (8th Cir., 1957) cited by Oseredzuk in his brief fail to support his position with respect to the claim that the Van Sciver Lake is a navigable water of the United States. Each of those cases dealt with personal injuries that were sustained on a lake that had been formed by the building of a dam across a river which previously had been a navigable river of the United States and as such was clearly within the Admiralty and Maritime jurisdiction of the United States. However, such is not the case here

where Van Sciver Lake has never been a navigable water of the United States.

Oseredzuk also quotes the classic definition of navigable waterways as recited in *The Daniel Ball,* 19 L. Ed. 999, 1001 (1870). This definition requires that for waters to be navigable they must, in their ordinary condition by themselves, or by uniting with other waters, form a continued highway over which commerce is or may be carried in interstate or foreign commerce in the customary modes in which such commerce is conducted by water. Oseredzuk urges that this definition indicates that the basic test is the commercial nature of the business. Rather, this test clearly requires that the waterways, in their natural state, be able to carry commerce *"in the customary modes in which such commerce is conducted by water"* (*The Daniel Ball, supra,* at 1001) (Emphasis supplied).

It is uncontradicted in the record of this case that Van Sciver Lake is land-locked. It is established that Van Sciver Lake is man-made and has always been land-locked. Accordingly, there is no possible manner by which Van Sciver Lake could be considered a continued highway for commerce conducted by water.

Oseredzuk places reliance upon the case of *Dow Chemical Company v. Dixie Carriers, Inc.,* 330 F. Supp. 1304 (S. D. Texas 1971). That case has no relevance to the facts involved herein. In that case, a canal was private but was connected with intercoastal waterways. It clearly had a direct connection by water with intercoastal commerce and was capable, in fact, of supporting and did indeed support the customary modes of commerce conducted by water as is required. Van Sciver Lake, being land-locked, is clearly distinguishable from the canal in the *Dow Chemical* case.

Oseredzuk contends that the court must also consider the feasibility of making Van Sciver Lake navigable to determine Admiralty jurisdiction. This position concedes

the fact that in its present state Van Sciver Lake is not a navigable water of the United States. The cases upon which Petitioner relies for this proposition are cases interpreting the expanse of the interstate commerce clause.

The Court in *Doran v. Lee, supra,* with respect to the application of the Commerce clause of the Constitution, stated that it:

> "defines the powers of the Congress to legislate but it cannot be used to enlarge the specific jurisdiction of the United States in Admiralty. The powers of Congress to legislate are greater than the powers of the Federal Courts to adjudicate." (page 811)

Oseredzuk admits that the exercise by Congress of its power to regulate interstate commerce under the Federal Power Act is based on unique economic considerations. An analysis of the major cases dealing with an interpretation of navigability indicates that there have been three principal sources of litigation, namely Admiralty matters, questions involving proprietary rights in rivers and those cases involving the Interstate Commerce interest of the Federal Government with respect to dams and bridges on and over waterways.

In the property and commerce cases, the test outlined in *The Daniel Ball, supra,* and *U. S. v. Appalachian Power Co.,* 311 U. S. 377, 85 L. Ed. 243 (1940) are liberally construed with respect to a determination of whether or not a stream is a navigable water of the United States. However, the admiralty courts usually rely on admiralty holdings and do not apply the proprietary or commerce test to strictly admiralty matters.

As was stated by the United States Court of Appeals for the 5th Circuit in the case of *The Lucky Lindy,* 76 F. 2d 561 (5th Cir. 1935) quoting from an opinion of Mr. Justice Clifford, in *The Belfast,* 7 Wall. 624, 640, 19 L. Ed. 266:

"Difficulties attend every attempt to define the exact limitations of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants."

The opinion of the Court in *The Lucky Lindy, supra,* can be interpreted to stand for the proposition that the power of Congress to regulate interstate commerce requires a lesser degree of navigation than that required in the admiralty cases and that that court was of the opinion that the commerce cases had no relevance in an admiralty issue.[1]

CONCLUSION.

In summary, it is apparent that the body of water upon which this incident occurred is not nor ever has been navigable within the meaning of the Admiralty and Maritime jurisdiction of the United States. This incident occurred exclusively within the confines of the Commonwealth of Pennsylvania. Accordingly, it is for that state through its legislation and common law to determine the rights and remedies of Oseredzuk and it is for the courts of that state to adjudicate these rights and remedies. The Order of the Court of Appeals affirming the Order of the District Court should be affirmed.

Respectfully submitted,

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1. See generally, Quinn, "An Analysis of Navigable Waters of the United States", XVII Baylor Law Review, No. 4, Fall 1966.